

J 21.23 : 90100201/2

305

Ref. No. 352

UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

UNITED STATES OF AMERICA,	)	
Complainant,	)	
	)	8 U.S.C. 1324a Proceeding
vs.	)	
	)	Case No. 90100201
ALVAND, INC.	)	
d/b/a 410 Diner,	)	
Respondent.	)	

MODIFICATION BY THE CHIEF ADMINISTRATIVE HEARING OFFICER  
OF THE ADMINISTRATIVE LAW JUDGE'S  
DECISION AND ORDER

I. SYNOPSIS OF PROCEEDING

On June 22, 1990, a complaint was filed by the United States of America, by and through its agency, the Immigration and Naturalization Service (hereinafter complainant) against Alvand, Inc. (hereinafter respondent). The complaint was filed with the Office of the Chief Administrative Hearing Officer, which served the complaint and a notice of hearing on the parties and assigned this matter to the Honorable Gordon J. Myatt, Administrative Law Judge (hereinafter ALJ).

The complaint alleged in five counts that the respondent violated the Immigration Reform and Control Act of 1986 (hereinafter IRCA) by failing to comply with the employment eligibility verification requirements (hereinafter paperwork requirements), appearing at 8 U.S.C. §§1324a(a) and 1324a(b). Specifically, the first count charged that respondent failed to prepare, and/or retain, and/or present for inspection Forms I-9 for the fifty-eight named individuals. The second count alleged that respondent failed to complete Forms I-9 for three employees within three business days of hiring. The third count charged that respondent failed to ensure that three employees completed section 1 of the Form I-9. The fourth count asserted that respondent failed to date section 2 of an employee's Form I-9. The fifth count charged that respondent failed to properly complete section 2 of the Form I-9 for two additional employees.

Respondent filed an answer on July 19, 1990, denying every allegation set forth in the complaint, and asserting three affirmative defenses. The first defense claimed that respondent had complied in good faith with the requirements of IRCA. The second defense asserted was essentially a claim of vindictive prosecution. The third defense did not contest liability, but rather asserted that the civil money penalty proposed by complainant was excessive. In later pleadings, the respondent also asserted that it failed to produce Forms I-9 because they were stolen, destroyed, or lost in a burglary that occurred at respondent's place of business.

The ALJ struck the first affirmative defense in an order dated December 3, 1990. In an order dated February 21, 1991, the ALJ rejected the second affirmative defense and disposed of the third, fourth, and fifth counts in favor of the complainant, thereby ruling against the respondent as to six of the allegations. The order of February 21 also granted complainant's motion for partial summary decision as to nine employees named in the first count of the complaint. The order denied summary decision with respect to the remaining 49 employees named in count one because the ALJ found that the defense of burglary raised a genuine issue of material fact. Complainant's motion for summary decision based on respondent's alleged failure to complete Forms I-9 for three employees within three business days of hiring was also denied by the ALJ.

A hearing was held on February 26 and 27, 1991, in San Antonio, Texas. Subsequently, the ALJ issued a decision and order, dated July 8, 1991, wherein the ALJ held that the respondent was not liable for the charges of paperwork violations regarding the 49 individuals. *ALJ's Decision and Order* at 9. The ALJ held the respondent liable for the second count, as the ALJ found that the respondent had not completed the Forms I-9 for three employees within the time limits prescribed by IRCA. *Id.* The ALJ imposed a civil money penalty in the amount of \$4,500.00 for the eighteen paperwork violations. *Id.* at 13.

Pursuant to 28 C.F.R §68.51(a), the complainant timely filed with the Chief Administrative Hearing Officer (hereinafter CAHO), on July 19, 1991, a request for administrative review, together with a memorandum of supporting arguments.

## II. THE ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER

In the decision and order, the ALJ found the respondent was not liable for failing to complete, retain and produce Forms I-9 for forty-nine individuals. *Id.* at 9. However, as stated, the ALJ did rule for the complainant regarding the three allegations set forth in count two.

Respecting the forty-nine individuals, the ALJ held that the respondent came forward with sufficient evidence to support its defense of burglary. *Id.* at 5. In reaching this conclusion, the ALJ pointed out that papers were scattered on the floor of the office where the burglary occurred and that there was damage to the office, including damage caused by the removal of a safe from its concrete setting. *Id.* at 4. The ALJ stated that this evidence created a strong inference that the Forms I-9 were lost or destroyed as a result of the burglary, thereby establishing a nexus between the burglary and the failure to present the forms. *Id.*

The ALJ also found that the complainant did not rebut respondent's affirmative defense by a preponderance of the evidence. *Id.* at 5. The ALJ stated that the absence of arson ☒ and the fact that there were no papers strewn anywhere except inside the office itself did not adequately rebut the defense of burglary. *Id.* Additionally, the ALJ found the testimony of respondent's bookkeeper (that it was possible the Forms I-9 were never completed by the respondent) was "ambiguous and lacked specificity" and therefore the ALJ ruled that this evidence did not rebut respondent's affirmative defense by a preponderance of the evidence. *Id.* at 6.

### III. CONTENTIONS OF THE PARTIES

In its request for administrative review, the complainant asserts that the ALJ erred in holding that the respondent was not liable for the forty-nine paperwork violations. The complainant claims there are four issues for review. First, the complainant states that the ALJ erred by failing to find the respondent's continuing obligation to complete Forms I-9 ☒ the original could not be found. *Complainant's Request for Review by the Chief Administrative Hearing Officer and Member* (hereinafter *Complainant's Request for Review*) at 4.

Second, the complainant asserted that the respondent shifted the burden of production to the complainant to prove the non-existence of the Forms I-9. The complainant had established that the Forms I-9 were destroyed. The complainant furthermore claimed

☒ As stated through the ALJ's decision, the complainant asserted initially that there was no evidence that the respondent could have destroyed the Forms I-9. However, the investigating police found no evidence of a fire. *Hearing*

the Forms I-9 existed and that they were lost, stolen, or destroyed as a result of the burglary was based upon "mere inference" drawn from evidence which does not support those inferences. *Id.* at 4, 9.

Next, the complainant contends that the ALJ failed to consider all the evidence presented and failed to give such evidence its proper weight in determining whether Forms I-9 had ever been prepared by the respondent. *Id.* at 4, 12.

Finally, the complainant states that the ALJ failed to consider all the evidence presented, and failed to give such evidence its proper weight in determining that the complainant failed to rebut respondent's affirmative defense of burglary. *Id.* at 4, 16.

Although not clearly asserted in the record, the respondent apparently contends that the I-9s were lost or stolen as a result of the burglary and therefore the respondent cannot be held liable for paperwork violations under IRCA. *ALJ's Decision and Order* at 2.

#### IV. REVIEW AUTHORITY OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

Administrative review of an ALJ's decision and order is provided for at 8 U.S.C. §1324a(e)(7) and 28 C.F.R. §68.51(a). Section 68.51(a) of 28 C.F.R. provides in pertinent part that:

. . . [W]ithin thirty (30) days from the date of the decision, the Chief Administrative Hearing Officer shall issue an order which adopts, affirms, modifies or vacates the Administrative Law Judge's order.

of the Chief  
Hearing Officer  
the final order of  
General.

review by the CAHO when  
is set forth in the  
regard to administrative  
Act indicates that "the  
would have in making the  
b). In addition, the U.S.  
circuit, in *Mester Manufacturing Co. v.*  
1989), held that the CAHO  
of review to the ALJ's

decision. Equally important, the Ninth Circuit in *Maka v. INS*, 904 F.2d 1351, 1355 (9th Cir. 1990) followed the reasoning in *Mester* by affirming the CAHO's authority to apply the de novo standard of review.

The Ninth Circuit in *Maka* also affirmed the CAHO's authority to disagree with the credibility findings of the ALJ, if there is substantial evidence undercutting the reliability of the testimony and if the CAHO states the reasons for doing so. 904 F.2d at 1355.

## V. DISCUSSION

### a. The burden of proof

The ALJ correctly analyzed the process of the shifting burden of proof in IRCA cases by noting that in IRCA proceedings, the complainant bears the ultimate burden of proving the allegations of the complaint by a preponderance of the evidence. *ALJ's Decision and Order* at 5. While this burden never varies, the ALJ explained, the burden of producing or going forward with evidence may shift between the parties. *Id.* The party which is in the best position to present evidence will bear the burden of evidence production. *Id.*

The respondent asserted, and the parties do not contest, that a burglary occurred on respondent's premises. *Joint Exhibit 1, Stipulation of Facts* at 3. In attempting to establish an affirmative defense of burglary, the respondent, as the party in the best position to present evidence, could only show that there were papers covering the floor of the office where the burglary occurred, that a safe was missing, and that the office as a result of the safe was damaged. *Transcript* at 148. This evidence, to establish a nexus between the present the Forms I-9 and to prove the affirmative defense of burglary, thereby shifting the burden of proof to the complainant.

Although IRCA, its legislative regulations provide little direction as to the burden of proof necessary to establish the affirmative defense of burglary, some direction can be gleaned from a standard used by some courts in civil cases. *Martin v. Weaver*, 456 U.S. 962 (1982), cert. denied, 456 U.S. 962 (1982), a case in which the Supreme Court held that the "burden of proving an affirmative defense by a preponderance of the credible evidence." 666 F.2d 804, 810 (6th Cir. 1981).

*Ashdown*, 118 Ohio St. 307, 160 N.E. 898 (1928). This proposition also appeared in *U.S. v. Wiring*, 646 F.2d 1037, 1042-43 (5th Cir. Unit B, June 1981). See also, *Shaw v. Grumman Aerospace Corporation*, 778 F.2d 736, 746 (11th Cir. 1985), *cert. denied*, 487 U.S. 1233 (1988). Accordingly, under this line of cases, not only must the complainant prove its prima facie case by a preponderance of the evidence, but the respondent who asserts an affirmative defense must also establish that defense by a preponderance. Adopting the standard in these cases, I conclude that once a complainant makes out a prima facie case of an employer sanctions violation under IRCA, a respondent attempting to establish an affirmative defense must do so by a preponderance of the evidence. Only then will the burden of proof properly shift back to the complainant.

In this proceeding, the respondent has apparently asserted an affirmative defense that a burglary occurred on the premises and that the burglary was the cause of the failure to present the Forms I-9. *ALJ's Decision and Order* at 2. In order to successfully establish that defense, the respondent must first provide some evidence that the Forms I-9 were actually completed. This evidence must outweigh complainant's evidence. Under this criteria the respondent's evidence was insufficient to maintain the asserted affirmative defense which would have shifted the burden back to the complainant. In fact, a preponderance of the evidence indicates that the Forms I-9 were never completed by the respondent for the forty-nine individuals in question.

b. Rebuttal of the affirmative defense

Assuming *arguendo* that the respondent met the standard in establishing its lifting the burden of proof back to the complainant would still successfully rebutted the preponderance of the evidence. The respondent, through its pleadings or at least the Forms I-9 were ever completed for the individuals. In fact, the record indicates that the respondent, for instance, the testimony, and I agree, that the respondent failed to complete the Forms I-9 with respect to the 49 individuals. *ALJ's Decision and Order* at 21, 1991, the ALJ ruled that there were work violations for nine individuals for burglary, (*ALJ's Decision and Complainant's Motion for Partial Summary*

*Decision* at 3) even though respondent had asserted that the Forms I-9 for those nine individuals were among those allegedly lost or destroyed as a result of the burglary. *Respondent's Answer to Motion for Summary Judgment* at 5. This certainly is indicative of the conclusion that respondent's business practices respecting the completion of Forms I-9 were inconsistent with the requirements of IRCA.

It is also relevant that the parties stipulated that respondent's bookkeeper was the person primarily responsible for completing Forms I-9 between 1986 and May of 1988. *Joint Exhibit 1, Stipulation of Facts* at 2. However, the testimony of the bookkeeper indicates that the bookkeeper never discussed the requirements of the employment eligibility verification system with the respondent. *Hearing Transcript* at 137. Additionally, it is unclear whether respondent, purportedly responsible for completing the Forms I-9 after May of 1988, even knew of its duties under IRCA. The only evidence of respondent's knowledge of IRCA is introduced through the only representative of respondent who testified, namely, the bookkeeper.

However, the bookkeeper's testimony appears to show that she had little, if any, knowledge of the consequences of failing to comply with the paperwork requirements of IRCA:

- Q: Prior to the inspection and the notice of intent to fine that followed that was issued in this case, were you aware of the consequences of failing to prepare a Form I-9?
- A: No, only that they would not be illegal.
- Q: When you say only that they would not be illegal, what do you mean by that?
- A: Whoever we would hire

*Id.* at 138.

- Q: Are you aware of within which time period you prepared?
- A: Three days after
- Q: Were you aware in June of 198
- A: No.
- Q: Have you really that time period commenced?
- A: Yes.

*Id.* at 139.

The bookkeeper had even less knowledge regarding the missing Forms I-9 and the testimonial evidence indicates that she did not even know if there were any Forms I-9 scattered on the floor of respondent's office following the burglary:

Q: Let me ask you this: Did you  
see any Forms I-9 on the floor?  
A: I don't know.

*Id.* at 150.

Certainly the conclusion can be drawn that if some Forms I-9 were stolen or destroyed, at least a few of the forms would have been found on the floor of the office (or immediately outside of the office), even if the forms were in tatters. However, the bookkeeper could not testify that a single Form I-9 was found on the floor of the office. Also, the police detective who investigated the burglary testified to the fact that no papers were found outside the confines of the office. *Id.* at 29-31.

In addition, the bookkeeper testified that she could not identify for the record a single Form I-9 that was lost or destroyed as a result of the burglary:

Q: Can you identify for me any I-9  
that was destroyed in the burglary?  
A: No.  
Q: Can you identify for me any employee  
on that list whose I-9 was lost in  
the burglary?  
A: No, not that I would know of.

*Id.* at 163.

This testimony does not support the conclusion reached by the ALJ, i.e., that Forms I-9 were lost, stolen, or destroyed as a result of the burglary. In fact, the bookkeeper's testimony as a whole did not introduce any probative evidence which would allow me to conclude, more probably than not, that the burglary caused the respondent's failure to present the Forms I-9 at issue.

Without any evidence presented in the record to the contrary, the testimony of the bookkeeper shows, more likely than not, that the burglary of respondent's business premises did not cause respondent's failure to prepare, retain, and/or



present the Forms I-9 for the forty-nine named individuals. Also, the respondent never presented evidence that the Forms I-9 existed in the first place.

I believe that this evidence indicates that the complainant established that it was more likely than not that the burglary was not the cause of the respondent's failure to prepare, retain, and/or present the Forms I-9. All of the evidence produced at the hearing indicates that the respondent's business practices were at the very least irregular and inconsistent with an attempt to comply with the employment verification system of IRCA, and therefore, Forms I-9 were most likely never completed by the respondent with respect to the forty-nine individuals.

The record does not allow me to make any other conclusion, since respondent did not present any evidence, testimonial or otherwise, to show that the Forms I-9 were ever completed. In fact, the record shows that it was probable that the Forms I-9 were never completed by the respondent. Therefore, even if the burden had shifted back to the complainant, the complainant rebutted the affirmative defense by a preponderance of the evidence.

c. Respondent's obligation to replace Forms I-9

The complainant asserts that the ALJ erred in failing to find that the respondent had a continuing obligation to reverify employment eligibility for those employees for whom the original Form I-9 could not be found. *Complainant's Request for Review* at 4, 5. However, because the respondent failed to establish the existence of the Forms I-9 in the first place, any nexus between the burglary and the failure to present Forms I-9 for inspection, it is unnecessary to resolve the issue of whether respondent had a duty to reverify eligibility following the burglary.

VI. CONCLUSION

The ALJ erred in holding that there was not enough evidence in asserting that the burglary caused the failure to present Forms I-9. The burden should remain on the complainant because the respondent failed to present evidence to establish a nexus between the burglary and the respondent's failure to present Forms I-9. Additionally, in order to succeed in its affirmative defense of burglary, the respondent would indicate that the Forms I-9 were never completed in the first instance. The respondent proffered